APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 79-2131

UNITED STATES OF AMERICA ex rel. WILLIAM SCOTT,
Petitioner-Appellant,

v.

ILLINOIS PAROLE AND PARDON BOARD and LOU BREWER,
Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79-C-860—Bernard M. Decker, *Judge.*

SUBMITTED* OCTOBER 28, 1981—DECIDED FEBRUARY 9, 1982

Before CUMMINGS, *Chief Judge*, SPRECHER and CUDAHY, *Circuit Judges.*

PER CURIAM. This is an appeal from the denial of a petition for a writ of habeas corpus. For the reasons which follow, we reverse the decision of the district court and remand for further proceedings.

* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Rule 34(a), Fed. R. App. P. (effective Aug. 1, 1979); Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

I

Petitioner William Scott is an inmate at the Stateville Correctional Center in Joliet, Illinois, serving a 25 to 40 year sentence for murder. On March 6, 1979, Scott was granted leave to file his *pro se* petition for habeas corpus. The petition alleged that the Illinois Parole and Pardon Board, now the Prisoner Review Board, had violated Scott's constitutional rights by denying his request for parole for the stated reason that release would deprecate the seriousness of the offense for which he was imprisoned. It also alleged that Scott's rights had been violated in that, unlike other Illinois state prisoners, he was not entitled to a mandatory release date under Ill. Rev. Stat. ch. 38, § 1003-2.1(1979). Scott alleged that he had served the minimum amount of time required under the sentence imposed on him,[1] but had twice been denied parole based on the seriousness of the offense. He claimed he was entitled to immediate release and requested the court to order such relief.

The respondents to the petition were the Warden of Stateville Correctional Center and the Illinois Prisoner Review Board. In reply to the district court's order that they answer the petition, respondents filed a motion for summary judgment with a supporting memorandum of law in which they argued, *inter alia*, that petitioner did not have a constitutional right to parole, that the reason given by the board for the denial was constitutionally sufficient, and that the fact that other inmates with similar records were paroled was not a denial of petitioner's constitutional rights.

The district court granted respondent's motion and dismissed the petition. It held that the Illinois statute governing parole release determinations did not create an expectancy of release on parole and that therefore, under *Greenholtz v. Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), due process did not apply. The Court further held that, even if due process did

[1] At the time his petition was filed Scott had been in prison for approximately eleven years.

apply, the reason provided by the Board for its decision to deny Scott parole was constitutionally sufficient. Finally, the Court held that the different treatment accorded Illinois prisoners sentenced under the new sentencing law did not violate Scott's Fourteenth Amendment right to equal protection of the law.

II

In *United States ex rel. Richerson v. Wolff*, 525 F.2d 797 (7th Cir. 1975), *cert. denied*, 425 U.S. 919 (1976), this court held that when a state holds out the possibility of parole and makes it an integral part of its penological system, "due process includes as a minimum requirement that reasons be given for the denial of parole release." *Id.* at 800. In this case, we are required to reconsider this conclusion in light of the Supreme Court's more recent decision in *Greenholtz v. Nebraska Penal and Correctional Center*, *supra*.

Greenholtz explicitly rejected the underlying rationale for our holding in *Richardson* that due process requirements apply to Illinois parole release procedures. It held that the mere fact that a state holds out the possibility of parole is not sufficient to invoke the protection of the Due Process Clause of the Fourteenth Amendment.

> That the state holds out the *possibility* of parole provides no more than a mere hope that the benefit will be obtained. *Board of Regents v. Roth*, *supra*, 408 U.S. at 577, 92 S.Ct. at 2709. To that extent the general interest asserted here is no more substantial than the inmate's hope that he will not be transferred to another prison, a hope which is not protected by due process. *Meachum v. Fano*, *supra*, 427 U.S. at 225; 96 S.Ct. at 2538 (1977); *Montanye v. Haymes*, 427 U.S. 236, 96 S.Ct. 2543, 49 L.Ed.2d 466 (1977).

425 U.S. at 11.

The *Greenholtz* Court also held, however, that even though the mere existence of a parole system does not give rise to a liberty interest entitled to constitutional protection, the specific statute governing parole release

determinations may have such an effect if it is phrased in such a way as to provide the inmates with a legitimate expectation of release on parole. The Court specifically found that the Nebraska statute there under consideration did create such an interest. In so holding, however, it emphasized that its conclusion was based on the unique structure and language of the Nebraska statute and cautioned that "whether any other state statute provides a protectible entitlement must be decided on a case-by-case basis." 442 U.S. at 12.

Since *Greenholtz*, other circuits that have considered the issue have generally found the language and structure of other state parole release statutes sufficiently unlike Nebraska's so as not to confer on state prisoners a constitutionally protected expectation of parole. *See Canderleria v. Griffin*, 641 F.2d 868 (10th Cir. 1981), and cases cited therein. *But see Williams v. Missouri Board of Probation and Parole*, 661 F.2d 697 (8th Cir. 1981). However, in none of these cases was the language of the statute considered by the court the same or even similar to that contained in the statute now before us. For this reason, these cases are of little relevance to the precise issue raised here. Resolution of that issue, as the Supreme Court indicated in *Greenholtz*, requires careful analysis of the specific statute under which parole release determinations are made. Naturally, the Nebraska parole release statute under consideration in that case provides a convenient starting point for that analysis.[2]

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[2] Neb. Rev. Stat. § 83-1, 114(1) at that time provided:

> Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:
>
> (a) There is a substantial risk that he will not conform to the conditions of parole;
>
> (b) His release would deprecate the seriousness of his crime or promote disrespect for law;
>
> (c) His release would have a substantially adverse effect on institutional discipline; or
>
> (d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

The Nebraska statute at issue in *Greenholtz* provided that the Nebraska Parole Board "shall" order the release of a prisoner eligible for parole "unless it is of the opinion that his release should be deferred" because of the existence of any of four specified criteria. In holding that this statute created an expectancy of release entitled to some measure of constitutional protection, the *Greenholtz* majority accepted the inmate's argument that "the structure of the provision together with its use of the word 'shall' binds the Board of Parole to release an inmate unless any one of the four specifically designated reasons are found." 442 U.S. at 11-12. The inmates had argued that the language of the statute created a presumption that parole release would be granted, which in turn created a legitimate expectation of release, absent the finding that one of the prescribed justifications for deferral existed. A majority of the Court agreed.

The Illinois parole release statute at issue in this case is practically a mirror image of the Nebraska statute. Section 1003-3-5(c) of the Illinois Unified Code of Corrections, Ill. Rev. Stat. ch. 38, § 1003-3-5(c) (1979) provides:

> (c) The Board shall not parole a person eligible for parole if it determines that:
>
> (1) there is a substantial risk that he will not conform to reasonable conditions of parole; or
> (2) his release at that time would deprecate the seriousness of his offense or promote disrespect for the law; or
> (3) his release would have a substantial adverse effect on institutional discipline.

Instead of directing the Board to release an eligible inmate unless one of the conditions is found, Illinois has simply stated the rule in the negative—the Board shall not release the inmate if one of the conditions is found. Even the specified conditions under which release is to be deferred are the same, except for the fact that the Nebraska statute includes an additional reason for deferral which Illinois' does not. Thus, like Nebraska's

parole release statute, section 1003-3-5(c) can be read as creating a legitimate expectation of release on parole.[3]

However, by stating its rule in the negative Illinois has left open the possibility that its statute can also be reasonably read as not creating an expectancy of release on parole. It can be read as merely a statement by the Illinois legislature as to when the Board must deny parole, leaving the Board free in the absence of those conditions to exercise its own discretion in deciding whether or not parole should be granted. Under this construction, the statute would not create a legitimate expectation of release and due process considerations would not apply. *See Averhart v. Tutsie*, 618 F.2d 479 (7th Cir. 1980) (where legislature has invested Parole Board with almost total discretion in such matters, inmate had no legitimate expectation of release).

Although there is no authoritative state court decision indicating which of these two possible constructions is correct,[4] both the Council Commentary to section 1003-3-

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[3] In *United States ex rel. McCalvin v. Irving*, 504 F. Supp. 368 (C.D. Ill. 1980), the United States District Court for the Central District of Illinois applied *Greenholtz* to section 1003-3-5(c) and concluded that because it lacked the precise "shall/unless" language and structure of Nebraska's statute, it did not give rise to a constitutionally protected liberty interest. We think this is a too narrow reading of *Greenholtz*.

[4] Although the Illinois courts have frequently noted that, as a general matter, parole is a matter of grace and clemency rather than of right, *People ex rel. Jones v. Brantley*, 45 Ill.2d 335, 337-38, 259 N.E.2d 33 (1970); *People v. Hawkins*, 54 Ill. 2d 247, 252, 296 N.E.2d 725 (1973); *People ex rel. Weaver v. Longo*, 57 Ill.2d 67, 309 N.E.2d 581 (1974), they have not interpreted the scope of the interest, if any, this particular provision was intended to afford Illinois state prisoners. The Illinois Appellate Court came closest to doing so in *People ex rel. Tucker v. Kotsos*, 42 Ill. App. 3d 812, 818, 356 N.E.2d 903 (1977). In comparing a parole release determination with a trial court's decision of whether to grant probation, the court stated:

> Similarly, with parole, the Parole and Pardon Board has great discretion in determining who shall be granted

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5(c) and the Board's own Rules Governing Parole persuade us that the Illinois parole release statute, like Nebraska's, requires the Board to release an inmate who is eligible for parole unless one of the specified reasons for denial are found to exist. The Council Commentary reads in part:

> Subparagraph (c) expands the vague charge to the Board to determine "whether [the offender] is capable again of becoming a law-abiding citizen." Section 203 (repealed). The Board should state one or more of the reasons listed in subparagraph (c) as the basis for its decision denying parole as required by subparagraph (f). Additional reasons may also be stated.

Ill. Ann. Stat. ch. 38 § 1003-3-5, pp. 87-88 (Smith-Hurd). This language indicates that, while other reasons may also be given for the denial, such reasons are to be additional to, and not in place of, the statutory reason or reasons relied upon. The implication is that parole must be granted where none of the specified reasons for denial are found to exist.[5]

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[4] *continued*

> parole. However, the Board must not parole a person eligible for parole if it is determined that there is a substantial risk that he will not conform to reasonable conditions of parole, his release at that time would deprecate the seriousness of his offense or promote disrespect for the law.

While this language seems to indicate that the second interpretation of section 1003-3-5(c) under which no liberty interest is created is correct, we do not find it conclusive since it is not clear on the issue and appeared only as dicta in the court's opinion. *Compare Averhart v. Tutsie*, *supra*, (Where Indiana Supreme Court had expressly held that that state's parole release statute was unlike Nebraska's in that it created no expectancy of release, this court is bound by that interpretation).

[5] Although the word "Additional" might also be read as meaning alternative, we are unpersuaded that this is the intended meaning in this context.

The Rules of the Illinois Prisoner Review Board, promulgated pursuant to Ill. Rev. Stat. ch. 38, § 1003-3-2(d), provide further support for this reading of the statute. Rule V entitled *Basis for Denying Parole* lists only the three statutorily prescribed reasons for denial with a set of factors under each for the Board to consider in determining whether it is met.[6] No other basis

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[6] Rule V reads:

V. BASIS FOR DENYING PAROLE

In accordance with statute, the Board shall not parole a candidate if it determines that:

A. There is substantial risk that the candidate will not conform to reasonable conditions of parole based on one or more of the following factors:
   1. Existence of prior adult felony convictions (mitigating as well as aggravating factors to be considered).
   2. An apparent pattern of aggressive or assaultive behavior (misdemeanor offenses also considered).
   3. Prior adult parole or probation violations within five years prior to the present offense.
   4. Refusal to be supervised on parole.
   5. No means of financial support or no place of residence. (Continuance not to exceed six months to seek resolution of problem.)
   6. A psychiatric examination determines the candidate is not likely to conform.

B. Release of the candidate would deprecate the seriousness of the offense or promote disrespect for the law, based on one or more of the following factors:
   1. The offense is one of murder, attempted murder or killing of an individual, robbery with a weapon, rape, indecent liberties, deviate sexual assault, aggravated kidnapping or kidnapping for ransom, armed violence, treason, aggravated arson, treason or calculated criminal drug conspiracy.
   2. The aggravating as well as mitigating circumstances as described in Chapter 38, Sections 1005-5-3.1 and 1005-5-3.2, Illinois Revised Statutes.

(Footnote continued on following page)

for a decision denying parole is listed. Rule VII entitled *Denial of Parole* states specifically that an order denying parole "shall contain the reason or reasons for denial based on No. V above and a concise statement of facts supporting the reason or reasons given."

In light of these rules, it appears that the Board itself has interpreted § 1003-3-5(c) as requiring a finding that one of the statutory criteria exist before it can deny an eligible inmate his parole. Read in this way, Illinois' parole release statute is no different than the Nebraska statute considered by the Supreme Court in *Greenholtz*. Like Nebraska's it creates a presumption that an eligible inmate will be paroled unless one of the specified grounds for denial is found to exist and, in doing so, provides him with a legitimate expectation of parole entitled to some measure of constitutional protection.

III

Having concluded that Illinois' parole release statute does create a constitutional liberty interest, it must now be determined whether the reason for denial given by the Board in this case is constitutionally sufficient.

In its notice to Scott informing him of the decision to deny his request for parole, the Board stated:

> The above action is taken based on the Board's feeling that release at this time would deprecate the severity of the crime for which you were convicted namely, Murder, receiving a 25-40 year sentence. Accordingly, your minimum sentence of 25 years,

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[6] *continued*

C. Release would have a substantially adverse effect on institutional discipline based on one or more of the following factors as established by the finding of an Administrative Review Board.

1. Physical attack on another inmate or institutional staff.
2. Possession of weapons or drugs.
3. Repeated violation of major institutional rules.
4. Violation of any act prohibited by law.

> does not make you eligible to be provided with a release date under the new law.

(R. 11, Exhibit A.) Scott claims that the Board's use of this "boiler plate" reason for denying his parole is constitutionally inadequate.

In *United States ex rel. Richerson v. Wolff, supra*, 525 F.2d at 804, this court adopted the test enunciated by the Second Circuit in *United States ex rel. Johnson v. Chairman of New York State Board of Parole*, 500 F.2d 925 (2d Cir.), *vacated as moot*, 419 U.S. 1015 (1974), for determining whether a statement of reasons for a denial of parole is sufficient to satisfy the requirements of the Due Process Clause of the Fourteenth Amendment. In *Johnson*, 500 F.2d at 934, the Second Circuit had said:

> To satisfy minimum due process requirements a statement of reasons should be sufficient to enable a reviewing body to determine whether parole has been denied for an impermissible reason or for no reason at all. For this essential purpose, detailed findings of fact are not required, provided the Board's decision is based upon consideration of all relevant factors and it furnishes to the inmate both the grounds for the decision . . . and the essential facts upon which the Board's inferences are based.

We believe this is still the applicable test for determining whether a statement of reasons for a decision denying parole is constitutionally adequate. *Greenholtz* makes clear that, even when the Due Process Clause applies to a parole release determination, there is "nothing in the due process concepts as they have thus far evolved that requires the Parole Board to specify the particular 'evidence' in the inmate's file or at his interview on which it rests the discretionary determination that an inmate is not ready for conditional release."[7] 442

[7] In rejecting this requirement, Chief Justice Burger wrote for the majority in *Greenholtz*, "[t]o require the parole authority to provide a summary of the evidence would tend to convert the process into an adversary proceeding and to equate

(Footnote continued on following page)

U.S. at 15. However, we do not read the *Johnson* test to require any such summary of the evidence relied upon. As we read *Johnson*, it requires only that the inmate be told why his request for parole has been denied. This can be accomplished simply by informing him of what in his record was felt by the Board to warrant his denial and why.

Turning to the particular facts of this case, we find we are unable to determine on the record before us whether the statement of reasons given by the Board meets this test. In two previous decisions, this court has upheld parole denials based on the seriousness of the offense for which the inmate was imprisoned. *Richerson, supra*; *Garcia v. United States Board of Parole*, 557 F.2d 100 (7th Cir. 1977). However, in both *Richerson* and *Garcia*, we were careful to point out that in its statement of reasons for the denial the parole board had indicated that it had considered the inmate's specific conduct, and not just the statutory offense for which he had been found criminally liable.[8] It is the failure of the Board to do the same here that causes us difficulty.

We do not dispute the fact that the Board could, at least insofar as the Constitution requires, adopt a prac-

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[7] *continued*
the Board's parole release determination with a guilt determination." 442 U.S. at 15-16. However, the Court implicitly approved the requirement that the parole authority provide the inmate with a statement of reasons when it denies parole, stating "[t]he Board communicates the reason for its denial as a guide to the inmate for his future behavior. *See Franklin v. Shields*, 569 F.2d at 800 (en banc)." *Id.* We think any reason for denial necessarily assumes some fact or facts about the inmate's case. It is this fact or facts that the Board should include in its statement of reasons.

[8] In *Richerson*, the Board's statement of denial, in addition to listing the inmate's statutory offenses, specifically referred to the fact that police officers had been wounded while doing their duty. 525 F.2d at 803. In *Garcia*, the Board noted that the inmate's conduct "involved the detonation of explosives during the bombing of several business establishments." 557 F.2d at 106.

tice of automatically denying parole to inmates convicted of certain offenses without regard to their specific conduct. Certain offenses, like murder, for instance, are by definition so serious that the Board could reasonably conclude that early release on parole would be inappropriate, regardless whether there were additional aggravating circumstances accompanying it. The Board is expressly empowered to make such a determination and it is not for this court to set it aside.

The difficulty in this case, however, is that we do not know if in fact the Board has adopted such a practice. Although the fact that the inmate was convicted of murder is listed in the Board's Rule V as one of the factors which it considers in determining whether release would deprecate the seriousness of the offense, we do not know from the record before us whether the Board automatically denies parole to all inmates whose commitment offense is murder. If it does not, then the reason for denial given by the Board in this case fails to satisfy the *Johnson* test. For unless the Board denies parole to all inmates whose commitment offense is murder, then its statement that it is denying parole for that reason in this case is tantamount to no reason at all. Clearly, if the Board does grant parole to some inmates whose commitment offense is murder, then its refusal to do so here, unless it is completely arbitrary, must be for some reason other than the fact that Scott was convicted of murder. If that is the case, we think that due process requires at a minimum that that reason be given.

We therefore find it necessary to remand this case to the district court to allow it to determine what in fact the Board's practice is. If that court finds that the Board does grant parole to persons whose commitment offense is murder, it should order the Board to reconsider Scott's request for parole and either grant that request or provide him with a sufficient statement of reasons for its denial.

IV

Lastly, Scott appears to argue that his constitutional rights have been violated by virtue of the fact that he is not eligible for release under Ill. Rev. Stat. ch. 38, § 1003-3-3(c). This section is part of the new sentencing law in Illinois under which the parole system has been eliminated and prisoners are assigned mandatory release dates. By its terms, the new law applies only to persons sentenced after February 1, 1978. Although some prisoners sentenced prior to that time may elect to have a mandatory release date assigned under the new law, that option is not available to prisoners with indeterminate sentences whose minimum term is twenty years or more. Ill. Rev. Stat. ch. 38, § 1003-3-2.1.

The fact that Scott is not entitled to a mandatory release date under the new act raises no claim cognizable under federal habeas corpus. States are certainly free to amend their sentencing laws and, having done so, they are not required to apply them retroactively to persons who have been validly sentenced under the law as it previously existed. In fact, where application of the new law would result in a more severe punishment, they are expressly prevented from doing so by the constitutional prohibition against *ex post facto* laws. *Welsh v. Mizell*, No. 80-1862 (7th Cir. January 12, 1982); *Rodriguez v. United States Parole Commission*, 594 F.2d 170, 173 (7th Cir. 1979). While it is unclear whether application of the new sentencing procedure here would result in a longer or shorter term of imprisonment, in either case Scott has no right to have the new law applied. Having been properly sentenced under the law as it existed at the time of his conviction, he is not entitled to modification at this time.

V

In conclusion, we hold that the Illinois parole release statute provides inmates still under the State's parole system with a constitutionally protected liberty interest. This being so, due process requires at a minimum that an inmate whose request for parole is denied be pro

vided with a statement of reasons for the denial. Because we cannot determine from the record before us whether the statement of reasons given by the Board in this case is constitutionally sufficient, we remand the case for further proceedings. Finally, Scott's objection to the fact that he is not entitled to a mandatory release date under Illinois' new sentencing law fails to state a claim for which federal habeas relief is available.

Accordingly, the district court's judgment is affirmed in part, and reversed and remanded in part.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

CORRECTED JUNE 24, 1982
June 18, 1982

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge*

UNITED STATES OF AMERICA, ex rel. WILLIAM SCOTT,
Petitioner-Appellant,

No. 79-2131 vs.

ILLINOIS PAROLE AND PARDON BOARD and LOU BREWER,
Respondents-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 79-C-860—Bernard M. Decker, *Judge.*

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* Circuit Judge Richard A. Posner did not participate in the consideration or decision of this petition.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled matter by counsel for Respondents-Appellees, a vote of the active members of the court are requested, and less than a majority of the members of the court who voted have voted to grant a rehearing *en banc*.[1] All of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *en banc* be, and the same is hereby, DENIED.[2]

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[1] Circuit Judge John L. Coffey requests that he be shown as one of the judges who voted to rehear the case *en banc*. Judge Coffey's statement dissenting from this order is attached hereto.

[2] Circuit Judge Sprecher, a member of the original panel voted to deny rehearing and to deny rehearing *en banc*. Judge Sprecher died on May 15, 1982.

Chief Judge Cummings and Judges Pell, Bauer, Wood, Cudahy, Eschbach and Coffey voted on the question whether Judge Sprecher's vote should be counted in the resolution of the petition. A majority of these judges voted to count Judge Sprecher's vote and it was so counted, together with the votes of the other judges listed at the head of this order.

COFFEY, *Circuit Judge*, dissenting:

I dissent from the order denying the petition for rehearing because, procedural questions aside, I do not believe that it is reasonable or proper for the vote of a former (deceased) member of the court to be used to prevent a majority of the remaining active members from rehearing this case which raises significant legal questions of potentially widespread impact. This is especially true here where Judge Sprecher's initial vote was issued in anticipation of a request that the remainder of the active members vote on the suggestion for rehearing "en banc." Judge Sprecher, a member of the original panel, voted to deny rehearing and rehearing en banc on March 3, 1982. A vote was not requested until May 7, 1982. Thus, obviously Judge Sprecher cast his vote nine weeks prior to the date on which the vote of the other court members was requested. Judge Sprecher died just eight days after this request. The final vote on the rehearing was not completed until May 20, 1982. I analogize the acceptance of Judge Sprecher's vote to a trial court's granting a motion to dismiss before argument was scheduled, heard or even requested.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 7, 1982

BEFORE

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge

No. 79-2131

UNITED STATES OF AMERICA, ex rel. WILLIAM SCOTT,
Petitioner-Appellant,

vs.

ILLINOIS PAROLE AND PARDON BOARD and LOU BREWER,
Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79-C-860—Bernard M. Decker, *Judge.*

This matter comes before the Court for its consideration upon the following document:

1. The "MOTION TO RECONSIDER" filed herein on June 25, 1982, by counsel for the respondents-appellees.

Respondents, Illinois Parole and Pardon Board, et al., have requested that this court reconsider its order of June 18, 1982, in which the court denied Respondents' Petition for Rehearing with Suggestion for Rehearing *en banc*. As an alternative request the Respondents ask the court to "disclose the numerical vote on the Petition for Rehearing and, if that vote was 4-4, Judge Posner's reason for not participating. . . ."

A majority of the active members* of the court have voted to *deny* Respondents' Motion to Reconsider. Respondents' alternative request is also DENIED.

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* Circuit Judge Richard A. Posner did not participate in the consideration or decision of this motion.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel. WILLIAM SCOTT,
Petitioner,

No. 79 C 860 -vs-

ILLINOIS PAROLE AND PARDON BOARD, et al.,
Respondents.

MEMORANDUM OPINION AND ORDER

Petitioner has applied for a writ of habeas corpus claiming that respondents have improperly denied him parole in violation of his rights under the due process and equal protection clauses of the Fourteenth Amendment. Respondents have moved for summary judgment.

The Supreme Court has recently discussed a prisoner's due process rights to discretionary parole. *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 47 U.S.L.W. 4581 (May 29, 1979). The Court first concluded that "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Id.* at 4583. Moreover, even if the state creates a parole system, a prisoner's interest in obtaining parole is not, generally, protected by the due process clause.

> "That the state holds out the *possibility* of parole provides no more than a mere hope that the benefit will be obtained. To that extent the general interest asserted here is no more substantial than the inmate's hope that he will not be transferred to another pris-

on, a hope which is not protected by due process." (Emphasis in original.) (Citation omitted.) *Id.* at 4584.

However, in *Greenholtz*, the Court concluded that the language of the Nebraska statute in question created an expectancy of release "entitled to some measure of constitutional protection." *Id.* The court noted that the Nebraska statute is somewhat unique and that "whether any other state statute provides a protectible entitlement must be decided on a case-by-case basis." *Id.*

The Nebraska statute provides for an order of release unless certain factors are present. By contrast, the Illinois statute does not require release on parole but, rather, sets forth instances in which parole shall not be granted. Ill.Rev.Stat. ch. 38, §1003-3-5. Therefore, the court concludes that the Illinois statute creates no expectancy of release on parole which is protected by due process.

Further, even if petitioner's interest in parole is entitled to some due process protection, the court concludes that the requisites of due process have been met. Petitioner's only argument centers on the reason for the denial of parole: that the Board felt that release at this time would deprecate the severity of the crime for which he was convicted. This reason satisfies minimum due process requirements. *See United States ex rel. Richerson v. Wolff*, 525 F.2d 797 (7th Cir. 1975), *cert. denied*, 425 U.S. 919 (1976); *United States ex rel. O'Connor v. MacDonald*, 449 F.Supp. 291 (N.D.Ill. 1978).

Finally, petitioner asserts that he is being denied due process and equal protection since he is not eligible for release under Ill.Rev.Stat. ch. 38, §1003-3-3(c). This provision is part of a new Illinois sentencing and release statute which eliminates parole and assigns each prisoner a mandatory release date. The release provisions are applicable to all persons sentenced after February 1, 1978.

The release provisions were also made applicable, by election, to some persons sentenced under the prior law. Ill.Rev.Stat. ch. 38, §1003-3-2.1. However, that section provides:

> "(b) No release date under this Section shall be set for any person sentenced to an indeterminate sentence under the law in effect prior to the effective date of this Amendatory Act of 1977 in which the minimum term of such sentence is 20 years or more."

Petitioner was sentenced prior to February 1, 1978, to a term of from 25 to 40 years. Therefore, he could not elect to have a release date set under §1003-3-2.1. He claims that this violates his rights to due process and equal protection.

The court has already concluded that petitioner has no protected entitlement to parole. Therefore, the fact that he is not entitled to mandatory release under the new law does not violate his right to due process.

Petitioner's equal protection claim also fails. As the Court stated in *McGinnis v. Royster*, 410 U.S. 263, 270 (1973), "the determination of an optimal time for parole eligibility . . . require[s] only some rational basis . . ."

> "We do not wish to inhibit state experimental classifications in a practical and troublesome area, but inquire only whether the challenged distinction rationally furthers some legitimate, articulated state purpose." *Id.*

In the present case, petitioner is treated differently than persons sentenced under the prior law to terms of less than twenty years. However, this distinction has as its rational basis the interest of the state in punishing serious crimes. *See Bel v. Chernoff*, 390 F.Supp. 1256, 1259 (D.Mass. 1975).

Further, though petitioner is also treated differently than those persons sentenced under the new law to terms of more than twenty years, the court concludes that he is not similarly situated with those persons. Judges apply different criteria in sentencing persons under the new law than they did under the prior law. For example, one of the differences is that under the new law, unlike the old law, parole is abolished. Further, the new law imposes determinate, rather than indeterminate, sentencing

and the length of sentences under the new law is different than under the old law. Thus, the court concludes that petitioner's rights to equal protection have not been violated.

Accordingly, respondents' motion for summary judgment is granted and petitioner's petition is dismissed.

ENTER: /s/ BERNARD M. DECKER
United States District Judge

DATED: August 27, 1979.

APPENDIX E

STATE OF ILLINOIS
PRISONER REVIEW BOARD ORDER
DOCKET NUMBER
49. DC

TO: THE WARDEN OR SUPERINTENDENT

The Prisoner Review Board has given due consideration to all reports and other factors in the case of:

NAME Willie Scott

NUMBER C-01420

FACILITY Stv.

The following order is your authority to release this individual on parole to the custody and supervision of the Office of Parole Services, or continued to hold for further action. If parole is ordered, said order is subject to being vacated prior to release to parole. Any release is contingent upon execution of Parole or Mandatory Supervised Release Agreement.

DATE August 30, 1978:

X Parole denied, continued to Aug. 79 X Docket

If you accept it, your release date will be none.

The Board's explanation of the basis for the decision will be forwarded to you next week.

PRISONER REVIEW BOARD

/s/ J. LONGO
/s/ J. IRVING
/s/ UNINTELLIGIBLE

STATE OF ILLINOIS
PRISONER REVIEW BOARD
JAMES R. IRVING, Chairman August 30, 1978

To: Willie Scott C-01420 Stateville

The basis for the Board's decision denying you parole at this time is explained as follows:

The above action is taken based on the Board's feeling that release at this time would deprecate the severity of the crime for which you were convicted, namely, Murder, receiving a 25-40 year sentence. Accordingly, your minimum sentence of 25 years, does not make you eligible to be provided with a release date under the new law.

tm

White: Board
Canary: Institution
Pink: Resident
Goldenrod: Clinical or Parole Services

PB 145 A

APPENDIX F

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ALLEN T. SANDERS,

Plaintiff-Petitioner,

v.

ILLINOIS PRISONER REVIEW BOARD, JAMES R. IRVING, Chairman, ILLINOIS PAROLE AND PARDON BOARD, and MARVIN REED, Warden, Stateville Penitentiary,

Defendants-Respondents.

No. 80 C 963

MEMORANDUM DECISION

In this combined civil rights, habeas corpus action plaintiff, Allen T. Sanders, alleges that the Illinois Prisoner Review Board violated his Fourteenth and Fifth Amendment due process rights when it denied him parole in 1977, 1978 and 1979 and that he was denied parole because he was engaged in the constitutionally protected action of guard house lawyering. Sanders seeks a new parole hearing, a declaration that his constitutional rights have been violated and immediate release from custody.

The facts are substantially undisputed. Sanders was indicted along with Ralph Bellamy for the murder and armed robbery of Chicago police officer Joseph Ferguson and the attempted murder and armed robbery of

Ferguson's partner Daniel Cambric. Sanders' motion for severance was granted and he was tried alone and found guilty of all charges by a jury in the Circuit Court of Cook County, Illinois. He was sentenced to 75 to 100 years' imprisonment on the murder charge and various lesser concurrent terms on the other charges.

Sanders became eligible for parole in 1977. He was denied parole in 1977 because "parole at this time would deprecate the seriousness of the offense and promote disrespect for the law." In 1978 he was denied parole for the same reason. In 1979, Sanders was denied parole for the third time. The basis for denial was again "the seriousness of [the] crimes [he had committed] murder, armed robbery and attempt murder." The Board added the additional reason that Sanders had been on parole when he committed the crimes for which he was currently serving time.

In April, 1979 Samuel Nolan, Acting Superintendent of Police for the City of Chicago, wrote to the Board and requested that Sanders not be released on parole. He stated that Sanders had shot and killed Ferguson in a wanton and cruel manner. Sanders was given a copy of that letter at the end of the 1979 hearing.

Sanders applied for a rehearing on the grounds that the Board had based its denial on false statements in Nolan's letter and on misleading statements in a report from the State's Attorney's office. He asked that the Nolan letter and the State's Attorney's report not be considered at the rehearing or, in the alternative, that he be given an opportunity to rebut that information. Sanders also asked that he be given access to his complete parole file. The Board denied Sanders' petition for rehearing stating that "[a]fter careful review of your request, along with the entire file in the matter, . . . '[t]he Board finds the information submitted does not warrant a rehearing. . . .'"

Sanders makes two constitutional claims: first that he was denied due process in his parole release hearing and second, that he was denied parole in retaliation for exercising his constitutional right of access to the courts.

To support his claim that his right to due process was violated in each of the three parole hearings Sanders alleges that: 1) the Board did not allow him access to his files or even that portion of his files which it relied on in denying him parole, 2) the Board relied on false and prejudicial information in denying him parole, and 3) the reasons given for denial of parole were in each instance constitutionally insufficient.

Respondents have moved to dismiss the § 1983 complaint and the § 2254 petition. In support of the motion respondents have filed supporting affidavits as well as copies of various papers from petitioner's file. Petitioner has similarly responded to the motion with matter outside the pleadings. We are now prepared to summarily decide the issues presented in this case. *See* Rule 12(b)(6), F.R.Civ.P., and 28 U.S.C. foll. § 2254 rules 8(a), 11.[1]

Respondents' motion to dismiss the due process claim is premised on two primary theories. First, they contend that no liberty or property interest is created by the Illinois parole statute and the petitioner is, therefore, not entitled to procedural due process protection. Second, they assert that if petitioner is entitled to due process protection, he would not be entitled to access to his entire master file or to a more specific reason for denial of parole than he was given. Respondents also contend that petitioner's allegations that he was denied parole because of false information in his file and as punishment for his activities in pending lawsuits against the Illinois Department of Corrections are unfounded.

The due process clause of the Fourteenth Amendment mandates procedural protections when government action deprives a person of a liberty or property interest. *Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972). Thus, the first question we address is whether a liberty or property interest attaches to parole release considerations. The Supreme Court recently reviewed the applicability of procedural protections to parole release considerations in *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979). The Court

stated that the creation of a state parole system does not automatically confer on prisoners a liberty interest entitled to due process protection. However, the Court held that a state parole statute could raise an expectancy of parole entitling prisoners to some measure of constitutional protection. The Court went on to hold that although the unique structure and language of the Nebraska statute created such an expectancy, whether other states' parole statutes provide a protectible entitlement must be decided on a case-by-case basis.

The statute creating a parole system in Illinois has been amended a number of times since Sanders was convicted in December of 1970. One of the major facelifts occurred in 1973, three years after Sanders was convicted and four years before his first parole hearing. Another one occurred in 1978. The parties do not discuss these changes or their impact on Sanders' interest in parole release and we will not. Suffice it to say that an interest which is dependent upon statutory language may change with amendments to the statute.

In debating the liberty interest issue, petitioner and respondents focus their attention on the language of Ill. Rev. Stat., ch. 38, § 1003-3-5(c) (1977). The parties acknowledge that the name of the Illinois paroling authority was changed from the Parole and Pardon Board to the Prisoner Review Board by the 1978 amendment to § 1003-3-5(c) (1977). This is the only significant amendment to §1003-3-5(c). Respondents argue that the language of this section does not create the protectible expectation of parole which the Supreme Court found in the language of the Nebraska statute.[2] Petitioner claims that this section is a "mirror image" of the Nebraska statute:[3] "The only difference between the two is that Nebraska expressly states that a prisoner shall be parolled [sic] if the exceptions are not present, while in Illinois, it is the obvious implication of the statute." Petitioner's brief in opposition to the motion to dismiss at p. 6.

We do not agree with petitioner. The Nebraska statute provides that an eligible prisoner shall be released

unless one of the four exceptions is present. Nothing in the language of the Illinois statute precludes the Board from denying parole for a reason other than the three listed; nothing in the Illinois statute expressly mandates release of a prisoner. Indeed, the Illinois statute prohibits parole if one of the three conditions is present.

In light of the Supreme Court's opinion in *Greenholtz*, this difference between the Nebraska and Illinois parole statutes is not inconsequential.

As the Seventh Circuit said in a prison transfer context: "[A] prisoner is not constitutionally entitled to procedural protections unless . . . 'he has some justifiable expectation rooted in state law that [he will not be denied parole] absent the occurrence of a specified factual predicate.'" *Stringer v. Rowe*, 616 F.2d 993, 996 (7th Cir. 1980) (*quoting Arsberry v. Sielaff*, 586 F.2d 37, 45 (7th Cir. 1978)).

Although we conclude that the Illinois statute does not create a justifiable expectation of release, a liberty interest may also be created by rule or regulation. Our next step is to examine the Illinois rules and regulations which petitioner contends create an expectation of release. We are faced with the obstacle created by substantial changes in the Illinois paroling scheme and the parties' failure to address the effect of the changes. Petitioner has attached to his memorandum in opposition to the motion to dismiss the regulation governing an inmate's master files, Administrative Regulation 844 of the Department of Corrections, and a set of rules of the Prisoner Review Board. The regulation has nothing to do with parole except insofar as it permits an inmate to review those parts of his file relied upon by the "Disciplinary Committee, Assignment Committee, Merit Staff or Parole and Pardon Board to make a determination which results in an increase in the length of confinement—such as parole denial or revocation." This regulation does not create an expectation of release.

The rules of the Prisoner Review Board which petitioner has submitted do not create such an expectation

either. Furthermore, these rules could not have any effect upon Sanders' consideration for parole in 1977 since they did not become effective until February 1, 1978. (We also question their applicability to the 1979 hearing since the first page states that the rules are effective for a period not to exceed 150 days.) These rules provide the same three reasons for denying parole as § 1003-3-5 of the Illinois parole statute, *supra*. The regulations, however, go into greater detail in describing when the three "predictive categories" exist. The rules, like the statute, do not mandate release if the factors are not found, but prohibit release if they are found. Therefore, the structure and language of the rules do not create an expectation of release on parole, as petitioner suggests.

Accordingly, petitioner has failed to show that he was entitled to procedural due process in his 1977, 1978 and 1979 parole release decisions.

Petitioner next contends that he was denied substantive due process to which he was entitled. As the Court of Appeals for the Third Circuit recognized, the Supreme Court's holding in *Greenholtz*

> "does not stand for the proposition that once a state decides to provide that which it is not constitutionally compelled to offer, there are no constitutional limitations whatsoever on the basis for making decisions under the program. *See Maher v. Roe*, 432 U.S. 464, 468 (1977); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). To interpret *Greenholtz* as so holding would be to ascribe to that opinion the intent to initiate a major upheaval in due process jurisprudence.
>
> * * *
>
> "As the Supreme Court emphasized in *Perry v. Sindermann*, 403 U.S. 593 (1972) '[f]or at least a quarter-century [the Supreme] Court has made clear that even though a person has no "right" to a valuable government benefit and even though the gov-

ernment may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely.' *Id.* at 597.

* * *

"The presence of a large measure of discretion in a parole system, . . . does not alter the fundamental due process limitation against capricious decision-making. A legislative grant of discretion does not amount to a license for arbitrary behavior. *Kent v. United States*, 383 U.S. 514, 533 (1966); *cf. Winsett v. McGinnes*, 617 F.2d 996, 1006 (3d Cir. 1980) (in banc), *petition for cert. filed sub nom. Anderson v. Winsett*, 49 U.S.L.W. 3001 (July 1, 1980) (No. 79-2014) (to be consistent with due process, discretion of prison authorities under Delaware work release program cannot be 'absolute' or 'unbridled'). Although *Greenholtz* indicates that a state may condition the expectation of parole, or even deny it completely, a state statute may not sanction totally arbitrary parole decisions founded on impermissible criteria.[2] Under the Supremacy Clause, a state statute may not vitiate the fundamental due process right to be free from arbitrary governmental action. See *Meachum v. Fano*, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting). Thus, *Greenholtz* does not affect the vitality of the numerous cases holding that courts can review the substance of parole decisions, as distinguished from the adequacy of the procedures, to determine whether a parole board exercised its authority arbitrarily. See, e.g., *Zannino v. Arnold*, 531 F.2d 687 (3d Cir. 1976); *Calabro v. United States Board of Parole*, 525 F.2d 660 (5th Cir. 1975); *Clay v. Henderson*, 524 F.2d 921, 924 (5th Cir. 1975); *Childs v. United States Board of Parole*, 511 F.2d 1270 (D.C. Cir. 1974). Even if a state statute does not give rise to a liberty interest in parole release under *Greenholtz*, once a state institutes a parole system all prisoners have a liberty interest flowing directly from the due process

clause in not being denied parole for arbitrary or constitutionally impermissible reasons."

"2/ For example, it would not appear appropriate to suggest that the holding in *Greenholtz* gives parole boards a license to deny parole on the basis of race, religion, or political beliefs, or on frivolous criteria with no rational relationship to the purpose of parole such as the color of one's eyes, the school one attended, or the style of one's clothing."

Block v. Potter, 631 F.2d 233, 235-36 (3d Cir. 1980).

Petitioner claims that the Board acted arbitrarily and capriciously in denying him parole. In support of this contention petitioner alleges that when it denied him parole, the Board relied on facts characterizing his offense as fatally shooting a police officer when in fact his co-defendant had fired the fatal shot and that it denied him parole in retaliation for his participation in litigation concerning the conditions of confinement at Stateville. The latter allegation clearly states a valid claim. The Board may not deny parole in retaliation for the prisoner's participation in constitutionally protected activities when the denial has no rational relationship to the objectives of parole. *Cf. Montanye v. Haymes*, 427 U.S. 236, 244 (1976). However, respondents have submitted the affidavits of the nine members of the Board which denied petitioner parole. Every affiant states that he or she did not know of Sanders' activities as a "jailhouse" lawyer and that if he or she had known of those activities it would not have influenced his or her decision. Petitioner has not submitted any evidence or even a statement rebutting these affidavits, nor does he challenge the veracity of the affiants. We therefore conclude that no hearing on this issue is necessary, *see* 28 U.S.C. foll. § 2254, rule 8. Respondents' motion for summary judgment on this issue is granted.

Although the constitutional ramifications of relying on misstated facts is not as clear, we find that petitioner

has failed to state facts sufficient to justify a hearing or a conclusion that the Board's decision was arbitrary or even an inference that the facts are so clearly false that they should have been expunged from petitioner's file when he notified the Board of the errors in the statements. We are not confronted with a situation in which parole was allegedly denied on the basis that the inmate's file described his conviction as one for murder when in fact it was for stealing a loaf of bread. Sanders was convicted of murder and armed robbery. Even the Illinois Supreme Court's recitation of the facts in its opinion concerning Sanders' appeal does not reveal whether Sanders or his co-defendant, Ralph Bellamy, fired the fatal bullet. *People v. Sanders*, 56 Ill. 2d 241, 306 N.E.2d 865 (1974). Moreover, under the Illinois criminal code there is no legal distinction between firing the fatal shot and taking part in the commission of a forcible felony during which the fatal shot is fired. Both acts can constitute murder. *See* Ill. Rev. Stat., ch. 38, § 9-1. Similarly, the rules of the Board which petitioner submitted to us do not distinguish between firing the shot and felony murder. *See* Rule V(B)(1). We also note that in notifying the Board that the characterizations of his offense in Nolan's letter are in error, petitioner did not present the Board with any written evidence that he did not fire the shot. We find that on the facts alleged and the evidence presented petitioner has not stated facts sufficient to warrant a hearing on whether the Board acted arbitrarily in denying him parole. *See* 28 U.S.C. foll. § 2254, rule 8. For the foregoing reasons, the petition for a writ of habeas corpus is denied and the complaint is dismissed. Judgment will enter accordingly.

ENTER:

/s/ PRENTICE H. MARSHALL
United States District Judge

DATED: January 13, 1981.

[1] Shortly after Sanders filed his complaint and petition, he filed a motion for appointment of counsel. We denied the motion without prejudice to its renewal after the pending motion to dismiss was disposed of. Petitioner responded to the motion to dismiss and filed a motion to reconsider our decision with respect to the appointment of counsel and asked specifically that G. Flint Taylor, Esq. be appointed to represent him. We again denied his request. Sanders is being assisted in his efforts in this case by Mr. Taylor whose name appears on Sanders' brief in opposition to the motion to dismiss. Therefore we have not treated the motion and papers submitted therewith as we would had they been submitted by a *pro se* prisoner without assistance of counsel, although we have treated the allegations of his complaint and petition for a writ of habeas corpus with such liberality.

[2] The Nebraska statute, as quoted by the Supreme Court, provides:

> "Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:
>
> "(a) There is a substantial risk that he will not conform to the conditions of parole;
>
> "(b) His release would depreciate the seriousness of his crime or promote disrespect for law;
>
> "(c) His release would have a substantially adverse effect on institutional discipline; or
>
> "(d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later late." Neb. Rev. Stat. § 83-1, 114(1).

[3] The Illinois statute which petitioner contends creates an expectation of release provides:

> § 1003-3-5. *Hearing and determination*
>
> "(a) The Parole and Pardon Board shall meet as often as need requires to consider persons for parole. It may meet and order its actions in panels of 3 or more members. The action of a majority of the panel shall be the action of the Board. In consideration of persons committed to the Juvenile Division, the panel shall have at least a majority of members experienced in juvenile matters.
>
> "(b) If the person under consideration for parole is in the custody of the Department, at least one member of the

Board shall interview him, and a report of that interview shall be available for the Board's consideration. However, in the discretion of the Board, the interview need not be conducted if a psychiatric examination determines that the person could not meaningfully contribute to the Board's consideration. The Board may in its discretion parole a person who is then outside the jurisdiction on his record without an interview.

"(c) The Board shall not parole a person eligible for parole if it determines that:

"(1) there is a substantial risk that he will not conform to reasonable conditions of parole; or

"(2) his release at that time would deprecate the seriousness of his offense or promote disrespect for the law; or

"(3) his release would have a substantially adverse effect on institutional discipline.

"(d) A person committed under the Juvenile Court Act who has not been sooner released shall be paroled on or before his 20th birthday to begin serving a period of parole under Section 3-3-8.

"(e) A person who has served the maximum term of imprisonment imposed at the time of sentencing less time credit for good behavior shall be released on parole to serve a period of parole under Section 5-8-1.

"(f) The Board shall render its decision within a reasonable time after hearing and shall state the basis therefor both in the records of the Board and in written notice to the person on whose application it has acted. In its decision, the Board shall set the person's release date, or if it denies parole it shall provide for a rehearing not more than 12 months from the date of denial. If the Board shall parole a person, and, if he is not released within 90 days from the date of the order granting parole, the matter shall be returned to the Board for review." P.A. 77-2097, § 3-3-5, approved July 26, 1972, eff. Jan. 1, 1973.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CLARENCE W. WALKER,

Plaintiff,

No. 79 C 623 vs.

JAMES IRVING, et al.,

Defendant.

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, DISTRICT JUDGE:

Plaintiff, an inmate of the Illinois State Penitentiary at Stateville, Joliet, Illinois, brings this *pro se* action challenging his denial of parole release by the Illinois Prisoner Review Board. Plaintiff invokes jurisdiction of the court under 28 U.S.C. §1343 (1976) and seeks injunctive relief. Before the court are the alternative motions of defendant James R. Irving, Chairman of the Illinois Prisoner Review Board, either to dismiss for failure to state a claim upon which relief may be granted or to grant summary judgment in his favor on the ground that no genuine issue as to a material fact exists. For the reasons hereinafter stated, the motion to dismiss will be granted.

Plaintiff challenges on due process grounds the practices followed by the Illinois Prisoner Review Board (Board) in deciding whether to grant a prisoner parole release.[1] Specifically, plaintiff alleges that he has been

[1] Plaintiff also alleges that the sentences he originally received (100-150 years for rape; 100-150 years for armed rob-

(Footnote continued on following page)

denied procedural due process by the failure of the Board to:

1. give him access to the information file upon which the decision is based; and
2. provide plaintiff with a written statement setting forth with specificity the facts upon which the Board relied in denying him parole.

The court will consider each of the procedural protections which plaintiff asserts to be constitutionally required.

I. *ACCESS TO FILE*

Plaintiff contends that he was denied due process because he was not given access to the information which the Board used in reaching its decision.

Illinois provides for discretionary parole. Ill. Rev. Stat. ch. 38, §1003-3-1 *et seq.* (Supp. 1978). In *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, ... U.S. ....., 99 S. Ct. 2100 (1979), the Supreme Court held that the mere possibility of discretionary parole release is not protected by the Due Process Clause of the Fourteenth Amendment. *Id.* at 2105. The *Greenholtz* court declared, however, that a state's statutory mechanism of parole *may* provide an expectancy of release that entitles a prisoner to some measure of constitutional protection. *Id.* at 2106. In addition, this Circuit has asserted that the predicate necessary to trigger the Due Process clause may also be found in official state policies or practices. *Arsberry v. Sielaff*, 586 F.2d 37, 47 (7th Cir.

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[1] *continued*

bery; and 19-20 years for attempted murder) were modified by the state. This court need not address this issue since where a state prisoner challenges the duration of his imprisonment and by way of relief seeks a determination that he is entitled to a speedier release, his sole federal remedy is a writ of habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475 (1973). The prisoner must, therefore, exhaust his state remedies before coming to federal court. *Id.*

1978); *Durso v. Rowe*, 579 F.2d 1365, 1369 (7th Cir. 1978), *cert. denied*, 99 S. Ct. 1033 (1979). Assuming, arguendo, that the Illinois parole statutes and/or official policies entitle a prisoner to constitutional protection,[2] the instant facts show that the plaintiff was not denied due process.

In *Greenholtz* a prisoner eligible for discretionary parole was permitted to appear before the Parole Board and present letters and statements on his own behalf. *Greenholtz*, *supra* at 2108. The Supreme Court declared that such a procedure "adequately safeguards against serious risks of error and thus satisfies due process." *Id.* at 2108. Similarly, Illinois requires at least one Board member to interview the prisoner, Ill. Rev. Stat. ch. 38, §1003-3-5(b) (Supp. 1978), and permits the prisoner to submit material to the Board. *Id.* § 1003-3-4(d). Therefore, because *Greenholtz* concluded that these procedures were sufficient to protect against error, plaintiff was not denied due process by the Board's denying him access to his file. *See also Dye v. United States Parole Commission*, 558 F.2d 1376 (10th Cir. 1977); *Williams v. Ward*, 556 F.2d 1143 (2d Cir. 1977); *Billiteri v. United States Board of Parole*, 541 F.2d 938 (2d Cir. 1976).

II. *WRITTEN STATEMENT OF REASONS*

Plaintiff further alleges that he was not given a statement sufficiently setting forth the reasons for the denial of his parole and the facts upon which the Board relied in reaching its decision. Plaintiff has been eligible for parole three times since January, 1977. Each time he has come before the Board his parole has been denied. Attached to plaintiff's complaint is a copy of the Board's most recent order setting forth the reasons for the denial. The statement of reasons reads:

---

[2] This court expresses no opinion as to whether the Illinois parole statutes are structured so as to entitle a prisoner to constitutional protection. In addition, the record in this case is insufficient to determine the scope of Illinois policies and practices with respect to parole.

> The above action is taken based on the Board's feeling that parole at this time would deprecate the seriousness of the crimes for which you were convicted and would also promote disrespect for the law. This is based on the crimes of Rape, Armed Robbery and Attempted Murder of which you received sentences ranging from 100-150 and 19-20 years. Due to the 100 year minimum, you do not qualify for a release date under the provisions of the new law.

Plaintiff contends that the Board's reliance upon the serious nature of his offense is an inadequate reason for the denial of his parole release.

The due process clause requires at a minimum that state parole authorities furnish a prisoner who is denied parole a brief statement of the grounds upon which the decision is based. *Richerson v. Wolff*, 525 F.2d 797, 800 (7th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976). In discussing these requirements, the *Richerson* court stated:

> To satisfy minimum due process requirements a statement of reasons should be sufficient to enable a reviewing body to determine whether parole has been denied for an impermissible reason or for no reason at all. For this essential purpose, detailed findings of fact are not required, provided the Board's decision is based upon consideration of all relevant factors and it furnishes to the inmate both the grounds for the decisions . . . and the essential facts upon which the Board's inferences are based. . . .

Id. at 804, *quoting United States ex rel. Johnson v. New York State Board of Parole*, 500 F.2d 925, 934 (2d Cir.), *vacated as moot*, 419 U.S. 1015 (1974).

In light of this standard, the statement by the Board in this case is constitutional. The Board gave their reasons for denial of parole in terms of the statutory guidelines governing a parole decision.[3] It further bolstered its reci-

[3] Illinois Revised Statutes ch. 38, §1003-3-5(c)(2) (Supp. 1978) provides that "the Board shall not parole a person eligible for parole if it determines that . . . his release . . . would deprecate the seriousness of his offense or promote disrespect for the law. . . ."

tation of the statutory language that parole would deprecate the gravity of plaintiff's offense by making specific reference to the crimes for which plaintiff was convicted—rape, armed robbery and attempted murder. Moreover, the Board indicated the severity of the crimes plaintiff committed by explicitly stating the long sentences received. The facts alleged in this case show that the Board's decision was neither arbitrary nor based on an impermissible factor. "To require more detailed findings would be to require the Board to issue an opinion supporting its decision, rather than a mere statement of reasons for its actions." *Garcia v. United States Board of Parole*, 557 F.2d 100, 105 (7th Cir. 1977).

For the reasons stated, defendant's motion to dismiss is granted and the cause is dismissed.

/s/ MARVIN E. ASPEN,
United States District Judge

DATED: 10/18/79

APPENDIX H

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable FRANK J. MCGARR

Cause No. 80 C 337 Date January 24, 1980

Title of Cause Roger Burns v. James Irving, et al.

Brief Statement of Motion _____

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel _____

Representing _____

Names and Addresses of other counsel entitled to notice and names of parties they represent. _____

Reserve space below for notations by minute clerk

Plaintiff brings this pro se complaint pursuant to 42 U.S.C. § 1983 alleging that defendants have violated his rights secured by the Fourteenth Amendment's due process and equal protection clauses by arbitrarily and discriminatorily denying him parole in five successive parole release hearings. For the reasons set forth in our recent opinion in *Parisie v. Irving*, 80 C 131 (N.D. Ill. Jan. 22, 1980), a copy of which is appended hereto, we deny plaintiff's motion for leave to proceed in forma pauperis. We note that the memorandum submitted in support of the instant complaint is virtually identical to the one submitted by the plaintiff in *Parisie*.

Hand this memorandum to the Clerk.

Counsel will not rise to address the Court until motion has been called.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN S. PARISIE,

Plaintiff,

v.

JAMES IRVING, et al.,

Defendants.

No. 80 C 131

MEMORANDUM OPINION AND ORDER

Plaintiff brings this *pro se* action pursuant to 42 U.S. §1983 alleging that defendants have violated his constitutional rights by arbitrarily denying him parole in three successive parole release hearings. Before the court is plaintiff's motion for leave to file *in forma pauperis*.

In *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, ... U.S. ....., 99 S.Ct. 2100 (1979), the Supreme Court held that, absent some state-created entitlement interest, the mere possibility of discretionary parole release is not protected by the Fourteenth Amendment's due process clause. Unlike the Nebraska statutes considered in *Greenholtz*, the Illinois statutory provisions governing parole release for prisoners serving indeterminate sentences, Ill.Rev.Stat. (Supp. 1978), Ch. 38, §1003-3-5, do not create a reasonable expectation of parole absent a requisite finding that a statutory justification for deferral of parole exists. As plaintiff points out in his complaint, the language of the relevant Illinois statute is phrased in the negative, thus leaving the decision to release an inmate who meets the minimal re-

quirements for parole to the unfettered discretion of the Illinois Prisoner Review Board. Because the statute does not give rise to an entitlement interest, plaintiff need not be accorded due process protections in parole release proceedings. Moreover, since the parole release decision "depends on an amalgam of elements, some of which are factual but many of which are purely subjective . . . ," *Greenholtz, supra* at 2105, we do not find the alleged disparity between the treatment of plaintiff and other prisoners convicted of murder to be of constitutional magnitude.

Finding plaintiff's complaint facially without legal merit, we deny plaintiff's motion for leave to file *in forma* pauperis. *Wartman v. Milwaukee County Court*, 510 F.2d 130 (7th Cir. 1975).

ENTER:

/s/ FRANK J. MCGARR
UNITED STATES DISTRICT JUDGE

DATED: January 22, 1980

APPENDIX I

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

SUBMITTED: NOVEMBER 4, 1981
December 8, 1981

Unpublished Order
Not To Be Cited
Per Circuit Rule 35

Before

Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge

ROGER A. BURNS,

Plaintiff-Appellant,

No. 80-1429 vs.

JAMES R. IRVING, Chairman of the Illinois Prisoner Review Board, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80-C-337—**Frank J. McGarr**, *Judge.*

ORDER

Plaintiff filed his civil rights suit based on 42 U.S.C. Section 1983 alleging that defendant had violated his constitutional rights by arbitrarily denying him parole. The trial court denied him leave to proceed in forma pauperis on his complaint. The district court relied on *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 42 U.S. ..... (1979) [sic], in holding that the Illinois statutory provisions governing parole release for prisoners serving indeterminate sentences do not create an entitlement interest so that plaintiff need be accorded due process protections in parole release proceedings. The trial court denied plaintiff leave to proceed in forma pauperis on the ground that the complaint was frivolous.

On May 21, 1980 we granted plaintiff leave to proceed on his appeal from this dismissal order, on the basis of complete review of the briefs and record we conclude that the order of the district court was sound. Thus, the dismissal order is hereby affirmed.

APPENDIX J

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

SUBMITTED: JULY 8, 1981*
July 23, 1981

Unpublished Order
Not To Be Cited
Per Circuit Rule 35

Before

Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge

EUGENE L. NEWBURY,

Plaintiff-Appellant,

No. 80-2352 vs.

JAMES R. IRVING, Chairman of Prisoner Review Board,

Defendant-Appellee.

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Rule 34(a), Fed. R. App. P. (effective Aug. 1, 1979); Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80-C-3728—James B. Moran, *Judge.*

ORDER

Plaintiff-appellant Eugene Newbury, an inmate at Stateville Correctional Center in Joliet, Illinois, appeals from an order of the district court denying his motion for leave to file his *pro se* civil rights suit *in forma pauperis.* We vacate the order of the district court and remand for further proceedings.

Under 28 U.S.C. § 1915(d) an individual may bring an action *in forma pauperis* in any court of the United States having jurisdiction over such action upon a showing that he is indigent. Leave to proceed *in forma pauperis* may be denied, however, if the action is frivolous or malicious. 28 U.S.C. § 1915(d); *Wartman v. Milwaukee County Court,* 510 F.2d 130, 134 (7th Cir. 1975).

Although the district court did not specifically so state in its order denying plaintiff leave to proceed, it apparently concluded that his action was frivolous. We disagree.

In his proffered complaint, plaintiff alleged that the Illinois Prison Review Board violated his Fourteenth Amendment right to due process of law by failing to provide him with an adequate statement of reasons for its decision to deny him parole. He claimed that the reason given by the Board, that release would deprecate the seriousness of his offense, was constitutionally insufficient and that a more detailed explanation for its decision was required.

The district court did not address the question of whether the reason given by the Board was constitutionally sufficient. Instead, it held that the Illinois statutes governing parole did not create a liberty interest within the meaning of the Constitution and that, therefore, under the reasoning of *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex,* 442 U.S. 1 (1979), due

process did not apply. On that basis, it denied plaintiff leave to proceed *in forma pauperis*.

We think the district court proceeded too hastily in deciding what is potentially a question of major significance for the State of Illinois. In *Greenholtz*, the Supreme Court held that, although a state's establishment of a parole system does not by itself create a constitutionally protected liberty interest, such an interest may be created by the state statutes governing parole determinations. The Court held in *Greenholtz* that the Nebraska statutes did create such an interest. It cautioned, however, that "whether any other state statute provides a protectible entitlement must be decided on a case-by-case basis." 442 U.S. at 12.

We are not unmindful of the differences between the Nebraska and Illinois statutes governing parole determinations. It may well be true, as the district court held, that these differences are so significant that Illinois' statutes, unlike Nebraska's, do not create an interest sufficient to invoke the guarantees of due process. It may also be true that, even if due process does apply to Illinois parole determinations, the reason given by the Board for denying plaintiff's request is constitutionally adequate. We intimate no view on either of these issues. Even if we were inclined to do so we would have to undertake the task without the aid of briefing from the named defendants who did not file briefs, jurisdiction never having been acquired over them.

We do believe, however, that neither issue has so little merit that plaintiff's request to proceed *in forma pauperis* should have been denied. As the well-written brief prepared at this court's request by Professor Gary H. Palm of the University of Chicago Law School makes clear, a rational argument can be made in support of plaintiff's position. For this reason and because of the possible impact this case could have on all Illinois parole determinations, we think the district court should have allowed plaintiff to proceed with his claim so that it could be more fully considered. We therefore vacate the district court's order and remand for further proceedings.

APPENDIX K

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 79-2131

UNITED STATES OF AMERICA ex rel. WILLIAM SCOTT,
Petitioner-Appellant,

vs.

ILLINOIS PAROLE AND PARDON BOARD, et al.,
Respondents-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 79 C 860—**Bernard M. Decker**, *Judge*.

NOTICE

TO: Gary H. Palm
Mandel Legal Aid Clinic
6020 South University Avenue
Chicago, Illinois 60637

PLEASE TAKE NOTICE that on April 28, 1982 I have filed with the Clerk of the United States Court of Appeals for the Seventh Circuit, a Motion for Leave to Cite Additional Authority, a copy of which is enclosed herewith.

TYRONE C. FAHNER
Attorney General
State of Illinois

BY: /s/ TERENCE M. MADSEN
Assistant Attorney General
188 W. Randolph St., Suite 2200
Chicago, Illinois 60601
(312) 793-2570

The undersigned being duly sworn upon oath deposes and states that a copy of the above Notice and Motion were served upon the above-named party on April 28, 1982 by depositing such copies in the U.S. mail at 160 N. LaSalle Street, Chicago, Illinois, in an envelope bearing sufficient postage.

/s/ _____

SUBSCRIBED AND SWORN to
before me this 28th day
of April, 1982.

/s/ _____
NOTARY PUBLIC

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 79-2131

UNITED STATES OF AMERICA ex rel. WILLIAM SCOTT,
Petitioner-Appellant,

vs.

ILLINOIS PAROLE AND PARDON BOARD, et al.,
Respondents-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 79 C 860—Bernard M. Decker, *Judge.*

MOTION FOR LEAVE TO CITE ADDITIONAL AUTHORITY

Respondents, by their attorney, TYRONE C. FAHNER, Attorney General of the State of Illinois, move this Court for leave to cite five additional decisions in support of propositions presented in the Petition for Rehearing and Suggestion for Rehearing In Banc. The respondents seek to cite the following cases:

1. *U.S.A. ex rel. Heirens v. Irving*, No. 80-3072 (C.D. Ill. 1980) and *Ware v. Kaufman*, No. 80 C 3209 (N.D. Ill. 1981), should be cited following *Parisie* in fn. 2, on page 4.
2. *Harris v. Irving*, 90 Ill. App. 3d 56, 412 N.E.2d 976 (5th Dist. 1980) should be cited following *Tucker* on page 7.
3. *Bowles v. Tennant*, 613 F.2d 776 (9th Cir. 1980); *Griffith v. Detrich*, 603 F.2d 118 (9th Cir. 1979); and, *Booth v. Hammock*, 605 F.2d 661 (2nd Cir. 1979) should be cited following the *Greenholtz* cite to 442 U.S. at 11, on page 6.

In support of this motion the respondents state that these cases came to counsel's attention only after the filing of the Petition for Rehearing and Suggestion for Rehearing In Banc and are important to this Court's full and fair consideration of the issues presented.

WHEREFORE; Respondents move the Court for leave to cite additional authority as set out in this motion.

Respectfully submitted,

TYRONE C. FAHNER
Attorney General
State of Illinois

BY: /s/ TERENCE M. MADSEN
Assistant Attorney General
188 W. Randolph St., Suite 2200
Chicago, Illinois 60601
(312) 793-2570

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

UNITED STATES OF AMERICA ex rel. WILLIAM HEIRENS,
Plaintiff,

v.

JAMES IRVING, et al.,
ILLINOIS PRISON REVIEW BOARD,
Defendants.

NO. 80-3072

MEMORANDUM ORDER

This is a civil action filed by plaintiff, William Heirens, a prisoner at the Vienna Correctional Center at Vienna, Illinois. The sole question presented by the complaint relates to the retroactive application to the plaintiff of a specific provision of Illinois' statutory paroling criteria, Ill. Rev. Stat. ch. 38, § 1003-3-5(c)(2). The plaintiff alleges that allowing the parole authorities to consider the seriousness of the offense of which the plaintiff was convicted, a criterion enacted after plaintiff's sentencing, effectively enhances the plaintiff's punishment in violation of the *ex post facto* prohibitions of the Illinois and United States Constitutions. Currently before this Court is a Motion to Dismiss, or, in the alternative, for Summary Judgment filed by the defendants.

In 1946, William Heirens pled guilty to various offenses, including three murder charges, and was sentenced to three consecutive life sentences, as well as a consecutive one year to life sentence for lesser offenses. At the time of plaintiff's sentencing, parole authorities were vested with total discretion in granting paroles.

The only statutory guideline was as follows: "In consideration of any application for parole due consideration and weight shall be given to the record of the prisoner's conduct kept by the superintendent or warden." Ill. Rev. Stat. ch. 38, § 808A (1945). In 1973, many years after the plaintiff's sentencing and incarceration, the Illinois legislature adopted the Unified Code of Corrections, which provides:

> c) The Board shall not parole a person eligible for parole if it determines that:
>
> (1) there is a substantial risk that he will not conform to reasonable conditions of parole; or
>
> (2) his release at that time would deprecate the seriousness of his offense or promote disrespect for the law; or
>
> (3) his release would have a substantially adverse effect on institutional discipline.

Ill. Rev. Stat. ch. 38 § 1003-3-5(c). The Illinois statutory parole criteria was based upon the Model Penal Code's parole criteria. Other jurisdictions, most importantly the federal system, have also adopted the Model Penal Code's parole criteria, with some variation in language.[1] *See*, 18 U.S.C. § 4206.

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[1] The U.S. parole criteria is as follows:

> (a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:
>
> (1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and
>
> (2) that release would not jeopardize the public welfare; subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released.

18 U.S.C. § 4206 (1976).

The plaintiff alleges that he has fulfilled all of the special deterrent paroling criteria in effect at the time he was sentenced, and that the only reason he is currently being denied parole is the parole authorities' consideration of the second criterion above stated, which was enacted after his sentencing. This argument is factually supported by Exhibit I attached to the complaint, a Prisoner Review Board Order indicating that the plaintiff was denied parole on November 27, 1979, because his release on parole would deprecate the seriousness of the offense or promote disrespect for the law. Plaintiff contends that this second criterion is based upon general deterrent theories prohibited by Illinois law, and that application of a general deterrent criteria after sentencing is *ex post facto* in nature.

The thrust of the defendant's Motion for Summary Judgment is that parole is a matter of clemency and grace, not a matter of right. *See, People v. Pace*, 362 Ill. 224 (1935). A retroactive change in the parole criteria, therefore, would not violate the plaintiff's substantive rights in that the prisoner remains subject to the same sentence, with parole altering only the method and degree of confinement during the period of commitment. In support of their position, defendants rely primarily upon *People ex rel. Kubala v. Kinney*, 25 Ill.2d 491, 494 (1962), where the Supreme Court of Illinois held that the legislature may change the terms and conditions for parole and make such change immediately applicable to those sentenced prior to the date of the change. Retroactive application of laws governing the terms and conditions for parole is permissible because parole is an act of clemency and grace.

The United States Supreme Court has recently held that not every law passed after a conviction is unconstitutional under Article I § 10 of the United States Constitution, which prohibits a State from passing any "ex post facto Law":

> It is equally well settled, however, that 'the inhibition upon the passage of *ex post facto* laws does not

> give a criminal a right to be tried in all respects by the law in force when the crime charged was committed.' *Gibson v. Mississippi*, 162 U.S. 565, 590 (1896). The constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, see *Malloy v. South Carolina*, 237 U.S. 180, 183, and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance. *Beazell v. Ohio* (269 U.S. 167), at 171.
>
> *Dobbert v. Florida*, 432 U.S. 282, 293 (1977).

A procedural change in the law, even though it has a detrimental impact upon the defendant, is not *ex post facto*. A procedural change does not make criminal a theretofore innocent act, nor does it make the punishment for a crime more burdensome, nor does it deprive one charged with crime of any defense available according to law at the time when the act was committed. *See, Beazell v. Ohio*, 269 U.S. 167, 169-170 (1925). The test is whether the later standard of punishment is more onerous than the earlier. *See, Lindsey v. Washington*, 301 U.S. 397, 400 (1937).

In *Portley v. Grossman*, 444 U.S. 1311 (1980), the Supreme Court considered the question of whether application of reparole guidelines in effect at the time of parole eligibility rather than the guidelines in effect at the time of sentencing violated the Constitutional prohibition against *ex post facto* laws. Reaffirming its holding in *Dobbert v. Florida, supra*, the court stated at p.1312 that:

> [T]he prohibition of *ex post facto* laws does not extend to every change of law that may work to the disadvantage of a defendant. It is intended to secure 'substantial personal rights' from retroactive deprivation and does not 'limit the legislative control of remedies and modes of procedure which do not affect matters of substance.'

Significantly, the court noted that because parole is a matter committed to agency discretion under federal

law, the terms of the sentence originally imposed were not altered. The burden of punishment remained the same in that the applicant for reparole could not be held in confinement beyond the term imposed by the judge. Because the guidelines did not deprive the applicant of any pre-existing right or enhance the punishment imposed, the court concluded that the change in the guidelines was in the nature of a procedural change.

It is my opinion that the paroling criterion at issue in the instant case, Ill. Rev. Stat. ch. 38 § 1003-3-5(c)(2), is not violative of the *ex post facto* prohibitions of the Illinois and United States Constitutions. The change in the statute governing paroling criteria is merely a procedural one. Analysis of the Illinois statute in light of recent federal decisions indicates that there is no substantive right to parole under the law of the state. Therefore, a change in the statute governing parole criteria does not affect a substantive right given to a prisoner in Illinois. Further, the present statute does not make the punishment for the crime more burdensome than previous law. It is for these reasons, to be explained hereafter, that plaintiff is not entitled to relief under 42 U.S.C. § 1983.

> I. The change in the statute governing parole criteria was a procedural one in that it affected no substantive right given to the prisoner under Illinois law.

Neither the statute in effect at the time plaintiff was sentenced, nor the current statute, confers upon the prisoner a right to parole once he becomes eligible by statute. The statute in effect at the time plaintiff was sentenced, Ill. Rev. Stat. ch. 38 § 808a (1945), is set forth as follows, in pertinent part:

> The Division of Correction in the Department of Public Safety shall exercise and discharge all the rights, powers and duties heretofore vested in the parole board and in the Department of Public Welfare in granting parole to persons sentenced or committed for crimes or offenses and in the supervision and aftercare of persons so paroled. The

> action of a majority of all the members of the Division of Correction shall be the action of said Division. No parole shall be granted except upon the concurrence of a majority of all the members of the Division of Correction. . . .

The Illinois statute now in effect, Ill. Rev. Stat. ch. 38 § 1003-3-5(c), precedes the list of three paroling criteria with the following words: "The Board shall not parole a person eligible for parole if it determines that: . . . ." These words are a significant departure from the words preceding the criteria as stated in the American Law Institute's Model Penal Code, Section 305.9, upon which the Illinois law is based. The phrasing of the Model Penal Code is: "(1) Whenever the Board of Parole considers the first release of a prisoner who is eligible for release on parole, *it shall be the policy of the Board to order his release*, unless the Board is of the opinion that his release should be deferred because . . ." (emphasis supplied). The Illinois statute vests discretion in the Board to grant or deny parole at the first parole eligibility hearing. However, the Board may not parole if any of the criteria cannot be met. The language of the Model Penal Code, on the other hand, grants to the prisoner at this first parole eligibility hearing the right to release on parole, unless one of the criteria cannot be met.

Recent federal decisions in which similar statutory paroling criteria were examined, look to the language of the statute to determine whether that statute grants to the prisoner a right to parole. In *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1978), the Supreme Court of the United States interpreted the Nebraska statutory parole criteria,[2] ex-

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[2] Nebraska parole criteria is as follows:

> Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:

(Footnote continued on following page)

tremely similar in its language to the Model Penal Code, to create a protectible expectation of parole. This right to parole, which was conferred by the state, was held to be a sufficient liberty interest to entitle the inmates to due process protections. The court agreed with the inmates that the structure of the provision, along with the use of the word "shall", binds the Board of Parole to release an inmate unless one of the four designated reasons are found.

The Seventh Circuit, in interpreting Indiana statutory paroling criteria, found no right to parole which required application of the strictures of due process in *Averhart v. Tutsie*, 618 F.2d 479 (1980). The *Averhart* court first differentiated the language of the Nebraska statute interpreted in *Greenholtz* from the language of the Indiana statute. The court found that the Indiana parole release statute creates no expectancy of release.[3]

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[2] *continued*

(a) There is a substantial risk that he will not conform to the conditions of parole;

(b) His release would depreciate the seriousness of his crime or promote disrespect for law;

(c) His release would have a substantially adverse effect on institutional discipline; or

(d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

Neb. Rev. Stat. § 83-1,114 (1) (1976).

[3] Indiana parole criteria is as follows:

(a) The Indiana parole board is authorized to release on parole, pursuant to the laws of Indiana, any person confined in any penal or correctional institution in this state except persons under sentence of death. It shall conduct hearings at each correctional institution at such time as may be necessary for a full study of the cases of prisoners eligible for release on parole and to determine when and under what conditions and to whom parole may be granted. All paroles shall issue upon order of the board, duly adopted. . . .

. . . .

(Footnote continued on following page)

In addition, the Seventh Circuit in *Averhart* pointed out that in accordance with *Bishop v. Wood*, 426 U.S. 341, 344 (1976), the "sufficiency of the claim of entitlement must be decided by reference to state law." The Indiana Supreme Court had interpreted the parole release statute in *Murphy v. Indiana Parole Board*, 397 N.E.2d 259, 263 (1979) as follows:

> Our parole release statute creates no expectancy of release as envisioned in the Nebraska statutory scheme; rather, our Legislature has invested the Parole Board with almost total discretion in such matters.

The Illinois Supreme Court has not interpreted the specific statute here involved. Therefore, the question of whether the Illinois law confers a right to parole, once eligible, must be determined by means of previous decisions and by means of examination of the language of the statute. First, the Illinois Supreme Court has repeatedly referred to the act of parole as a matter of clemency and grace. *People v. Pace*, 362 Ill.2d 224 (1935); *People ex rel. Kubala v. Kinney*, 25 Ill.2d 491 (1962); *People v. Nowak*, 387 Ill. 11 (1944). Secondly, the wording of the Illinois statute appears to confer no entitlement to parole for the inmate. It does not approximate the language of the uniquely structured Nebraska statute, *See, Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 12 (1978), but

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[3] *continued*

> (c) Before ordering the parole of any prisoner, the Indiana parole board shall have the prisoner appear before it, and shall interview him. A parole shall be ordered only for the best interest of society, not as an award of clemency; it shall not be considered to be a reduction of sentence or pardon. A prisoner shall be placed on parole only when arrangements have been made for his proper employment, or for his maintenance and care, and only when the Indiana parole board believes that he is able and willing to fulfill the obligations of a law-abiding citizen. . . .

Ind. Code § 11-1-1-9.

instead vests in the Board discretion in deciding whether an inmate shall be released. Because the plaintiff here possessed no right to parole under the law of the state, no "substantial right" is involved which might trigger application of the *ex post facto* prohibitions. *See, Dobbert v. Florida, supra.*

II. The change in the statute governing parole criteria was a procedural one in that it did not make the punishment for the crime more burdensome.

A law is merely procedural in effect and does not violate the *ex post facto* prohibitions of the Illinois and United States Constitutions where it does not make the punishment for the crime more burdensome. *See, Dobbert v. Florida, supra.* Plaintiff asks that this court find that the Illinois statute makes his punishment more burdensome. The portion of the statute of which plaintiff complains, Ill. Rev. Stat. ch. 38, § 1003-3-5(c)(2), allows the parole board to deny parole on the basis that parole at that time might deprecate the seriousness of the offense or promote disrespect for the law. Analysis of cases dealing with the *ex post facto* implications of statutes similar to that of Illinois, notably the federal parole guidelines, and application of the facts of the instant case, persuade this court that the Illinois statute does not violate the Constitutional prohibition as applied to plaintiff.

Extensive examination of caselaw dealing with the *ex post facto* effect of paroling criteria, whether statutory or administrative in form, reveals that the Circuits exhibit differing concerns premised upon the facts of the individual case. Those cases in which the facts indicate a denial or postponement of a parole hearing formerly available to the prisoner at the time of sentencing, are those which are found to violate the ex post facto prohibition of the Constitution. *See, Warden v. Marrero*, 417 U.S. 653 (1973); *Greenfield v. Scafati*, 277 F. Supp. 644 (D.C. Mass. 1967), *aff'd mens.* 390 U.S. 713 (1968); *Rodriguez v. United States Parole Comm.*, 594

F.2d 170 (7th Cir. 1979); *Cox v. Benson*, 548 F.2d 548 (7th Cir. 1977). If deprivation or postponement of a parole hearing is not the issue in the case, the circuits have decided on a case-by-case basis whether the law is *ex post facto*, focusing in each case upon whether the new statute made the punishment for the crime more burdensome.

The Third Circuit's concern in *Geraghty v. U.S. Parole Commission*, 579 F.2d 238 (3rd Cir. 1978), was that the prisoner did not receive individualized consideration as to the severity of the offense. At the time of Geraghty's sentencing, he was eligible for parole. However, by the time of his first parole hearing, Geraghty claimed that the Commission had established a customary time to be served for prisoners who had committed crimes as "severe" as the one for which he was convicted. The Commission, on the other hand, alleged that it undertook individualized consideration of prisoners' applications, similar to that consideration given before the guidelines went into effect. On the basis of these facts, the court stated at page 266:

> It is clear that the legislature could not retroactively, without offending the *ex post facto* clause of the Constitution, substantially decrease parole eligibility by legislation . . . And to maintain that the present parole guidelines enact no substantial limitation on parole eligibility may well be to misinterpret both the legal and practical effects of the guidelines.

However, because there was a controverted issue of material fact as to the method for determination of parole eligibility, the court determined that the case was inappropriate for summary judgment. The implication of the decision is that if the Board gave individualized consideration to each prisoner's application, refusing to apply a customary time period for service in each case, the law might not be considered *ex post facto* in nature.

The Supreme Court of the United States took this issue on certiorari in *U.S. Parole Comm. v. Geraghty*, No. 78-572 (March 19, 1980), but subsequently declined to decide it, saying at footnote 1, p. 1:

> The grant of certiorari also included the question of the validity of the Parole Release Guidelines, an issue left open in *U. S. v. Addonizio*, 442 U.S. 178, 184 (1979). We have concluded, however, that it would be premature to reach the merits of the question at this time.

The Sixth Circuit in *Ruip v. U.S.*, 555 F.2d 1331, 1334 (1977), looked to the traditional definition of an *ex post facto* law found in *Calder v. Bull*, 3 U.S. 386, 390 (1798), which states that a law falls within the prohibition on *ex post facto* laws if it:

> makes an action done before the passing of the law, and which was innocent when done, criminal; or . . . changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed.

The court then noted that the statutes which apply in determining parole eligibility were entirely different statutes from the law annexed to the crime, in that case bank robbery. Further, the court held that the administrative guidelines did not have the characteristics of law and were not encompassed in the prohibition on *ex post facto* laws since they merely clarified the exercise of administrative discretion.

The Seventh Circuit in *Garcia v. U.S. Board of Parole*, 557 F.2d (1977), held that the board did not abuse its discretion in denying Garcia parole solely because his release would deprecate the seriousness of his offense. That case merely established that offense severity is sufficient to deny parole and did not deal with any *ex post facto* implications of the statute.

In its discussion of the Indiana parole guidelines, the Seventh Circuit in *Averhart v. Tutsie*, 618 F.2d 479 (1980), interpreted the Supreme Court's decision in

Greenholtz, supra, as recognizing that parole determinations must necessarily include the seriousness of the offense. In addition, the *Averhart* court found no violation of the double jeopardy prohibition of the Constitution as a result of denial of parole because of the seriousness of the offense. The court held that the denial of parole merely perpetuates the *status quo* where state law does not give the prisoner a right to parole; that is, "the prisoner remains incarcerated under a validly imposed sentence." *Averhart, id.* at p. 483.

In the instant case, plaintiff has not been denied a parole eligibility hearing, nor has any hearing been postponed. No claim has been made that his application was denied individualized consideration. The presence of these factors might require that this court find the Illinois statute violative of the *ex post facto* prohibition of the Constitution.

In final analysis then, this court must look to Illinois law to determine whether the statute involved makes the punishment of the plaintiff more burdensome than that of the previous law in effect at the time of plaintiff's sentencing.

Under Illinois law at the time of plaintiff's sentencing, the Division of Correction was vested with total discretion in the decision of granting or denying parole. Ill. Rev. Stat. ch. § 808(a)(1945). The only directive from the legislature was that "due consideration and weight was to be given to the record of the prisoner's conduct." Consideration of other factors in making the parole decision was not prohibited by statute and, in fact, it is likely that multiple factors were weighed by the Commission in making the final determination. The parole decision made under the law in effect at the time of plaintiff's sentencing was an arbitrary one.

The promotion of respect for the law has always been a legitimate consideration in law-making for any state or nation which abhors anarchy and desires the rule of law. In addition, a state has a legitimate concern in considering the seriousness of the offense committed in

order that it may safeguard society from repetition of heinous crimes.

The total discretion given to the Parole Commission statutorily and in caselaw at the time of Heirens' sentencing included these traditional considerations which plaintiff deems of a general deterrent nature, together with consideration of the record of the prisoner's conduct while incarcerated. The final determination of the grant or denial of parole was totally discretionary, "a matter of clemency and grace," *Kubala v. Kinney, supra*, and based upon many factors. The current paroling criteria, Ill. Rev. Stat. ch. 38 § 1003-3-5(c), also vests in the Parole Board discretion in the paroling decision, and considers the seriousness of the offense and the effect upon the public of the early release of a criminal whose crime was a serious one. Therefore, I find that present Illinois law has merely clarified the previous law, and had not altered any considerations for parole release. The punishment is not more burdensome to plaintiff under current law. In fact, because the current law is less arbitrary in application, it may enhance a prisoner's chance of parole.

Additionally, plaintiff's punishment for his crimes has not been increased by the denial of parole. Plaintiff entered a plea of guilty to three murders as well as lesser offenses and was sentenced by the judge. Plaintiff cannot be held in confinement beyond the term imposed; therefore, his sentence has not been increased beyond the term of the sentence set by the judge. Parole would alter only the method and degree of confinement during the period of commitment.

Plaintiff here asserts some type of wrongfulness in the consideration of the seriousness of the offense and the promotion of respect for the law, factors which he terms general deterrent factors. Instead, he urges, only the goal of rehabilitation of the offender may rightfully be considered in the parole decision made by a parole board.

The legislative history of the federal paroling criteria, 18 U.S.C. § 4206 (1976), also based upon the Model Penal Code's recommended criteria, not only refutes plaintiff's assertions but illustrates that Congress emphasized the need for the balancing of general deterrent factors and special deterrent factors in making the final parole determinations. The prerequisites to parole under the Senate version of the legislation were that there be a reasonable probability that the person would remain at liberty without violating the law, and that release not be incompatible with the welfare of society. In the Conference Report, the result of compromise between the House and Senate versions, parole was characterized as an extension of the sentencing process in which the parole decision makers must:

> [W]eigh the concepts of general and special deterrence, retribution and punishment, all of which are matters of judgment . . . and come up with determinations of what is meant by 'would not depreciate the seriousness of the offense or promote disrespect for the law' that, to the extent possible, are not inconsistent with findings of other parole decisions.

Conference Report, 1976 U.S. Code, Cong. and Admin. News p. 26, 358. The final version of the federal law requires that a prisoner not be released if the Commission determines that release would jeopardize the public welfare. *See*, 18 U.S.C. § 4206(2).

Plaintiff is not entitled to relief as a result of any violation of the *ex post facto* prohibition of the Constitution. The statutory paroling criteria of Illinois gives the prisoner no right to parole once he becomes eligible by statute. Because there is no right to parole, a change in parole criteria is merely procedural. Further, where the current statute does not make the punishment for the crime more burdensome than previous law, the change is merely procedural. Under the previous law, the board had discretion to consider any factor, and parole was merely a matter of clemency and grace. Current law merely sets forth standards which may have been consid-

ered under previous law. Therefore, the later standard of punishment is not more onerous than the earlier, and subsequent law merely perpetuates the *status quo*. Consequently, the specific paroling criteria upon which plaintiff's claim is based, Ill. Rev. Stat. ch. 38 § 1003-3-5(c)(2), is not, in its application to plaintiff, unconstitutional but is merely a procedural change not violative of the *ex post facto* prohibitions under *Dobbert v. Florida*, *supra*. Defendants' Motion for Summary Judgment is hereby granted.

Enter this 4 day of December, 1980.

/s/ J. WALDO ACKERMAN
United States District Judge

APPENDIX L

Case Name	Number	Court
Bradley v. Fairman	82-2085	(C.D. Ill.)
Graham v. McCombs	82-3100	(S.D. Ill.)
Clouser v. McGinnis	82-3137	(C.D. Ill.)
U.S. ex rel. Louis Toney Allen v. Joseph McComb	82 C 3689	(N.D. Ill.)
Sobacki v. Illinois Prisoner Review Board	82-3105	(S.D. Ill.)
U.S. ex rel. Ganter v. Fairman	82 C 3872	(N.D. Ill.)
U.S. ex rel. Akbar v. Fairman	82 C 1608	(N.D. Ill.)
U.S. ex rel. Mitchell v. McComb	82 C 3962	(N.D. Ill.)
U.S. ex rel. Talach v. Illinois Prisoner Review Board	82 C 1988	(N.D. Ill.)
U.S. ex rel. Goss v. McCombs	82 C 3845	(N.D. Ill.)
U.S. ex rel. Davenport v. McCombs	82 C 4357	(N.D. Ill.)
U.S. ex rel. Lewis v. Prisoner Review Board	82 C 3251	(N.D. Ill.)
U.S. ex rel. Horton v. Irving	82 C 2569	(N.D. Ill.)
U.S. ex rel. Edwards v. Fairman	82 C 2389	(N.D. Ill.)
U.S. ex rel. Jones v. Gramley	82 C 2992	(N.D. Ill.)
U.S. ex rel. Lockett v. Lane	82 C 4416	(N.D. Ill.)
U.S. ex rel. Blount v. McComb	82 C 3688	(N.D. Ill.)
U.S. ex rel. Bunting v. McGinnis, et al.	82 C 4830	(N.D. Ill.)
U.S. ex rel. Townsend v. McGinnis	82 C 4831	(N.D. Ill.)
U.S. ex rel. Hinton v. Fairman	82 C 4725	(N.D. Ill.)
U.S. ex rel. Allen v. McComb	82 C 4591	(N.D. Ill.)
Amin Asad a/k/a Henry Thompson v. McComb	82 C 2089	(N.D. Ill.)
U.S. ex rel. Jacobs v. DeRobertis	82 C 4356	(N.D. Ill.)
U.S. ex rel. Johnson v. Fairman	82 C 2811	(N.D. Ill.)
U.S. ex rel. Leonard v. McGinnis	82 C 1986	(N.D. Ill.)
U.S. ex rel. Mallett v. Fahner	82 C 1295	(N.D. Ill.)
U.S. ex rel. McCalvin v. Irving	80 C 1522	(N.D. Ill.)
U.S. ex rel. Rogers v. Illinois Prisoner Review Board	82 C 2415	(N.D. Ill.)

APPENDIX M

STATE OF ILLINOIS
DEPARTMENT OF CORRECTIONS
PAROLE AND PARDON BOARD ORDER

DOCKET NUMBER
DC EN BANC Carb. W/P

TO THE WARDEN OR SUPERINTENDENT

last f/f Sept. Dkt.

The Parole and Pardon Board has given due consideration to all reports and other factors in the case of:

NAME William Witherspoon
NUMBER C25214
FACILITY Sheridan

The following order is your authority to release this individual on parole to the custody and supervision of the Office of Field Services, or continued to hold for further action. If parole is ordered, said order is subject to being vacated prior to release to parole and is contingent upon execution of Parole Agreement.

DATE October 13, 1977

X Parole denied, continued to August 1980

X Docket

THE BOARD GAVE THE FOLLOWING IN EXPLANATION OF THEIR DECISION:

The Board recognizes the unusually good display of institutional adjustment and presumed rehabilitation in your case, but must also consider the nature of the offense, the killing of a uniformed policeman, your fourth felony offense. Thus, you must be regarded as an habitual offender, the gravity of which offense precludes favorable parole consideration at this time.

APPENDIX N

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS

Amendment X of the United States Constitution provides that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XIV of the United States Constitution provides that:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, § 11 of the Illinois Constitution of 1970 provides that:

> All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. No conviction shall work corruption of blood or forfeiture of estate. No person shall be transported out of the State for an offense committed within the State.

STATUTORY PROVISIONS

Ill. Rev. Stat. 1973, ch. 38, § 1003-3-5(c) provides, in pertinent part, that:

Parole shall be denied if the board finds:

(1) There is substantial risk that [the prisoner] will not conform to reasonable conditions of parole; or

(2) his release at that time would deprecate the seriousness of his offense or promote disrespect for the law, or

(3) his release would have a substantially adverse effect on institutional discipline.

Ill. Rev. Stat. 1973, ch. 38, § 1003-3-5 provides, in pertinent part, that:

(f) The Board shall render its decision within a reasonable time after hearing, and shall state the basis therefor both in the records of the Board and in written notice to the person on whose application it has acted. In its decision, the Board shall set the person's time for release, or if it denies parole it shall provide for a rehearing not more than twelve months from the date of denial. If the Board shall parole a person, and, if he is not released within 90 days from the effective date of the order granting parole, the matter shall be returned to the Board for review.

ADMINISTRATIVE REGULATIONS

IV. THE PAROLE HEARINGS

A. Panels

Panels of members of the Prisoner Review Board shall hold hearings at the various institutions and facilities each month. Interviewing members of the Board will hear those cases of persons whose names appear on the respective dockets for hearing.

B. Appearance and Notices

Fifteen days or otherwise reasonably prior to the first hearing of felony cases, notices shall be given by the Board to the State's Attorney of the county from which the person was committed

and to the complaining witnesses (aggrieved parties).

Interviewing members will hear applications and shall consider written responses, correspondence and summary reports of interviews of persons who support or oppose parole or, where requested, allow such persons to make personal appearances.

An interviewing member may administer an oath to the prospective parolee and to any person who appears to be heard.

The Board may in its discretion consider and parole a prospective parolee, who is then outside the jurisdiction of Illinois, on his record without a personal interview, which may be waived by the prospective parolee.

C. Records Access

A parole candidate shall have access to all documents which the Board considers in denying parole or setting a release date. If such documents have not been disclosed to the candidate before the interview, they shall be disclosed to him during the interview. If, in light of the documents, the candidate so desires, he shall be granted a 30-day continuance.

D. Conference

1. At the conclusion of the interview, the interviewing Board member or members who interviewed the prospective parolee shall make a summary report of pertinent information concerning:
   a) The institutional records.
   b) The interview of the individual.
   c) Those who appeared or addressed comment to the Board.
2. The members of the Board shall meet in conference at the institution or facility and consider the cases of all persons heard on the respective docket. In addition to the sum-

mary report of the Board member concerning the interview, the panel shall consider the following:

a) Material submitted by the clerk of the committing court at the time of commitment to the Department of Corrections, including the sentence or adjudication, any pre-sentence reports and the statement by the State's Attorney and any statement by the attorney who represented the applicant at his original sentencing.

b) The clinical evaluation prepared by the Department of Corrections at the time of commitment.

c) Any report by the Department and the chief administrative officer concerning the individual.

d) A parole progress report.

e) Any medical or psychiatric reports available to the Board.

f) Any relevant material submitted by the prospective parolee.

3. The Board may consider any other information in the file or submitted in support or opposition to parole by other persons.

4. Oral arguments in favor of or in opposition to parole will not be heard by the panel in conference.

V. BASIS FOR DENYING PAROLE

In accordance with statute, the Board shall not parole a candidate if it determines that:

A. There is a substantial risk that the candidate will not conform to reasonable conditions of parole based on one or more of the following factors:

1. Existence of prior adult felony convictions (mitigating as well as aggravating factors to be considered).
2. An apparent pattern of aggressive or assaultive behavior (misdemeanor offenses also considered).
3. Prior adult parole or probation violations within five years prior to the present offense.
4. Refusal to be supervised on parole.
5. No means of financial support or no place of residence. (Continuance not to exceed six months to seek resolution of problem.)
6. A psychiatric examination determines the candidate is not likely to conform.

B. Release of the candidate would deprecate the seriousness of the offense or promote disrespect for the law, based on one or more of the following factors:

1. The offense is one of murder, attempted murder or killing of an individual, robbery with a weapon, rape, indecent liberties, deviate sexual assault, aggravated kidnapping or kidnapping for ransom, armed violence, treason, aggravated arson, treason or calculated criminal drug conspiracy.
2. The aggravating as well as mitigating circumstances as described in Chapter 38, Sections 1005-5-3.1 and 1005-5-3.2, Illinois Revised Statutes.

C. Release would have a substantially adverse effect on institutional discipline based on one or more of the following factors as established by the finding of an Administrative Review Board.

1. Physical attack on another inmate or institutional staff.
2. Possession of weapons or drugs.

3. Repeated violation of major institutional rules.

4. Violation of any act prohibited by law.

VI. ORDER OF PAROLE

If the members of the Board in conference determine that the parole should be allowed, they will enter an order for parole, setting the date of release to parole, allowing good time credits to apply. The order of a panel shall be the order of the Board and shall be delivered to the inmate within seven (7) days of its entry.